SUPREME COURT, U. S. No. 406
NOV 17 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HUGH MILLER MERCER, *et al.*,
Appellants,

—against—

ARTHUR I. HEMMINGS, *et al.*,
Appellees.

HERMAN W. BEVIS, *et al.*,
Appellants,

—against—

MARK W. EASTLAND, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING

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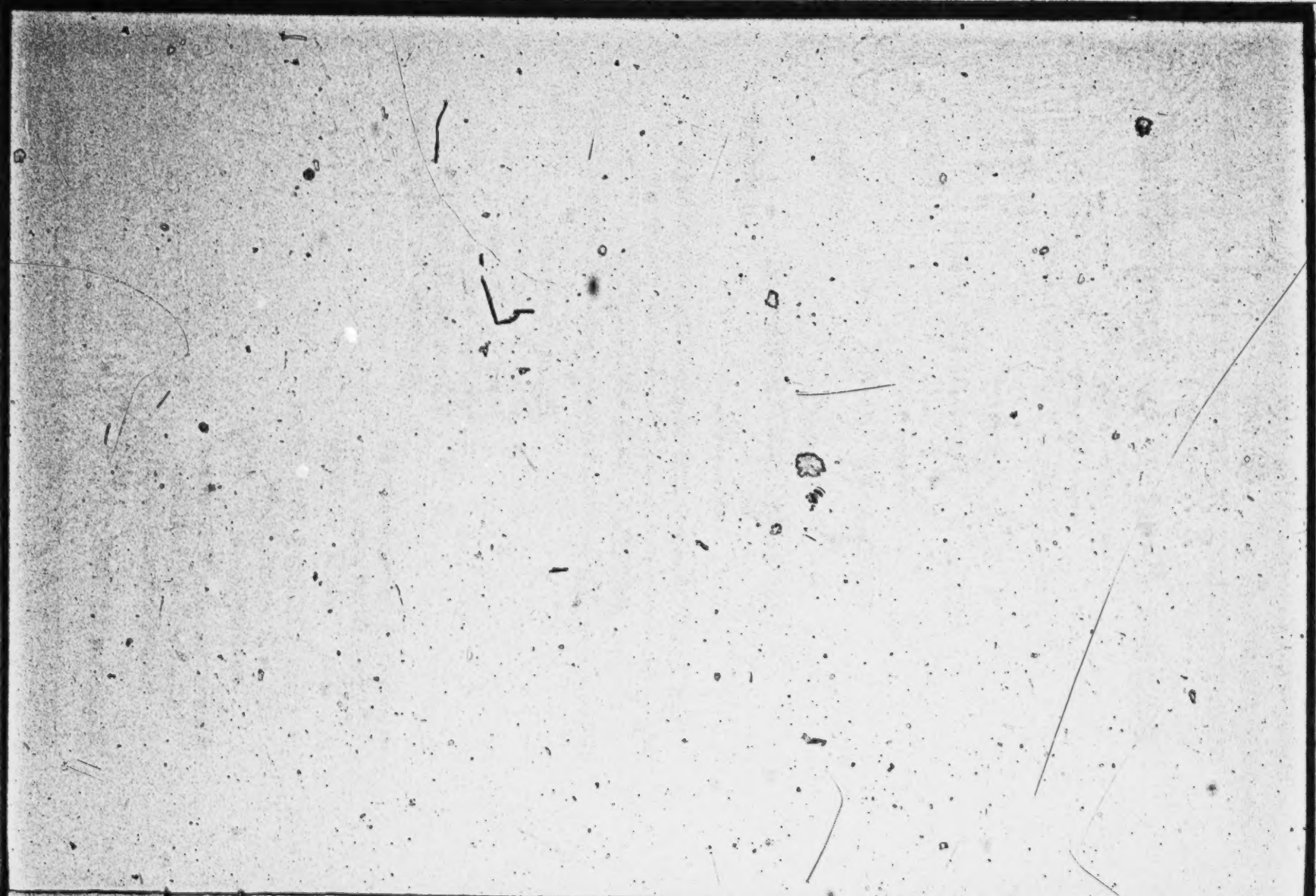
November 17, 1967.



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Appellants pray that the Court grant rehearing of its decision of October 23, 1967, granting appellees' motion to dismiss and dismissing the appeals for want of a substantial federal question, and that the Court note probable jurisdiction and assign the cases for oral argument for the reasons set forth below and in the Jurisdictional Statement. Alternatively, appellants pray that the Court invite the Solicitor General to express the views of the Securities and Exchange Commission.

Argument

Appellants' Jurisdictional Statement, in stressing the commerce clause and other constitutional issues in these cases, may not have sufficiently emphasized the immediate and damaging impact of the decisions below. Moreover, our emphasis on appellants' private claims may have obscured the injury which the decisions below will cause in the public sector, by reducing the quality of financial reporting for interstate companies and hence impairing the protection of investors. We are submitting this petition because that injury is a matter of substantial concern not only to the accounting profession in general but also to the broader business and financial community, as we believe will be underscored by supporting *amici* presentations which will be offered to this Court. We also assume that the Securities and Exchange Commission will likewise be concerned with the impact on its regulatory activities and accounting policies.

1. The decisions below operate effectively to prevent Price Waterhouse (as well as other interstate accounting firms) from serving its interstate clients' auditing needs in Florida because:

(a) the Price Waterhouse firm cannot practice on a permanent basis in Florida since

(i) its over 150 partners cannot all obtain permanent Florida licenses because they cannot all meet Florida's residence requirements; and

(ii) Florida law also prohibits a resident Price Waterhouse partner fully licensed by the Florida Board and subject to its discipline from acting as the firm's representative, agent or manager within the state. F.S. 473.16, F.S. 473.23;

(b) the Price Waterhouse firm can no longer obtain temporary licenses to practice in Florida since

(i) under the rules of the Florida Board of Accountancy such licenses will not be granted to Price Waterhouse if it maintains a full time Florida office with a resident staff, even if the work of that office is devoted entirely to servicing interstate clients who have retained Price Waterhouse to audit their national operations; and

(ii) it is completely impractical for Price Waterhouse to serve the audit and related needs of its more than 100 such interstate clients, who by the nature of their substantial operations require year-round attention in Florida, except by utilizing full-time resident staff and offices with appropriate facilities and records. Temporary incursions into the state on a transient basis, whatever their former practicality for a few clients with minor Florida operations, have not sufficed for many years.

2. The exclusion of Price Waterhouse from the state is not theoretical. It is imminent. Perhaps this Court has inferred that some sort of administrative accommodation with the Board is possible, inasmuch as appellants have been able to maintain full-time offices in the state for several years during the pendency of the litigation. However, the fact is that the trial court's decree contained an injunction restraining appellants "from rendering accounting services in the State of Florida of the kind and nature that have heretofore been rendered" by them (Appendix to Jurisdictional Statement 44a-45a, 47a) and that such injunction was merely stayed while the litigation proceeded. On Octo-

ber 24, 1967, the very next day after this Court dismissed these appeals, the Board moved to vacate that stay.*

3. Appellants will thus shortly be relegated to the "purchase" of auditing services from Florida-certified accountants (Appendix to Jurisdictional Statement 15a). As "purchasers" they will of course be prohibited from exercising control or supervision of the local Florida accountant in the performance of the work even though that may be necessary in order to ensure its quality and completeness. That prohibition is emphasized by F. S. 473.16, which prevents a Florida-certified public accountant from acting as the "representative, agent or manager" of a nonresident firm. It is further emphasized and implemented by Board Rule 20-10.03, which establishes criteria aimed at insuring the total independence (and insularity) of the local accountant vis-à-vis the nonresident firm.**

4. The inability of Price Waterhouse as a "purchaser" to supervise or control the work will have a seriously deleterious effect on financial reporting for the large publicly held national companies which are its clients. Both the managements of such companies and their investors insist that audit work be done by interstate firms such as Price Waterhouse because (1) they have confidence in such firms' high standards of competence and independence and (2) only such firms, with experienced and well established operating staffs and facilities in many states, can effectively perform an integrated audit of the entire corporate enter-

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* The hearing on that motion has been adjourned until December 19, 1967, upon appellants' representation that they intended to file this petition for certiorari.

** The full text of that Rule, which condemns any exercise of "control" over the "professional practice of the Florida correspondent" [illegible] is set out in the Appendix to Jurisdictional Statement. See also related Rules 20-10.01 and 20-10.02, *id.* at 62a-63a.

prise. If a firm such as Price Waterhouse cannot perform the substantial audit work required for the Florida operations of its clients, but must rely on the unsupervised work of others, a fundamental doubt will be raised as to its ability to take responsibility for a client's financial statements in so far as they involve Florida activities. Indeed, if the Florida activities were to comprise a substantial enough portion of the total, there would be doubt as to whether the auditor could express an unqualified opinion as to the financial statements at all.

Such doubts as to auditing responsibility are inherently antithetical to the accounting policies contained in SEC Regulation S-X. *See especially*, Rules 2-02(b) and 2-05, 17 C. F. R. §§ 210.2-02(b), 210.2-05 (1964), appellants' brief opposing motion to dismiss at 3 note**. If there is any doubt about what we say on this score, we respectfully suggest that the Court invite the Solicitor General to express the views of the SEC.

This fragmentation in audit responsibility which results from Florida's restrictive scheme is, in our view, the most basic issue on this appeal. A multistate corporation operating in Florida and in any other states which may follow its parochial lead would be required to have as many separate audits as there were such states, and no one firm of auditors could possibly take responsibility for an overall audit. The auditor's opinions available to investors would be fragmentary, uncoordinated and totally ineffectual in conveying an overall unified expression of opinion as to the financial results of the corporate operations as a whole.

We submit that this fragmentation—real and potential—is substantial in its federal implications and presents questions which deserve a full hearing on the merits. Such fragmentation is wholly at odds with the salutary and expanding emphasis on consistency in application of accounting principles and centralization of responsibility for the audit function; only through such consistency and centrali-

zation can the investing public meaningfully evaluate the financial reports of various multistate businesses and be assured that the accountants who audit those reports will be held to the highest standards of professional competence and responsibility.

Conclusion

For all of the foregoing reasons, appellants respectfully pray that the Court grant rehearing, note probable jurisdiction, and direct a hearing on the merits. In the alternative, appellants respectfully request that the Court invite the Solicitor General to express the views of the Securities and Exchange Commission.

November 17, 1967

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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